

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SOUTHERN SERVICE CORPORATION, a )  
Florida Corporation and FULL SERVICE )  
SYSTEMS, a Florida corporation, )

03:05-CV-0297-LRH (RAM)

Plaintiffs, )

ORDER

vs. )

EXCEL BUILDING SERVICES, INC., d/b/a/ )  
E.B.S., Inc., a Nevada corporation, DOES 1 )  
through DOES 10 and CORPORATIONS 1 )  
through 10, inclusive, )

Defendants. )

Presently before this court is Defendant Excel Building Services, Inc.'s motion for summary judgment (#40<sup>1</sup>). Plaintiffs, Southern Service Corp. and Full Service Systems, have filed an opposition (#47), to which Defendant has replied (#53). This motion preceded the motion to amend complaint (#48) decided and filed concurrently with this order. The two motions are fully independent of each other.

**FACTS AND PROCEDURAL HISTORY**

The original complaint which began this action was filed May 18, 2005. Plaintiffs alleged three causes of action including violation of Nevada's Trade Practices and Consumer Fraud Act, interference with contract and interference with prospective economic advantage.

After limited initial written discovery the parties agreed to settle their claims. As a result, a settlement agreement was reached and placed on the record October 5, 2005. However, before

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<sup>1</sup> References to (#XX) refer to the court's docket.

1 the agreement could be executed Plaintiffs moved to set aside the agreement on the grounds  
2 Defendant withheld material information during the settlement negotiations.

3 Plaintiffs' claims are grounded in the allegation that Defendant engaged in a series of  
4 illegal business practices which reduced Defendant's overall costs. These reduced costs allowed  
5 Defendant to underbid Plaintiff on several contracts awarding cleaning services to large hotels.  
6 Further, Plaintiffs allege that they lost several contracts they had already been awarded because  
7 Defendant's lower prices were too attractive to be overlooked.

8 Defendant contends that no illegal activities have occurred and that its lower prices are  
9 simply the result of better business practices. Each side has presented evidence in the form of  
10 affidavits in support of their positions.

11 Defendant has moved for summary judgment as to the three claims in the original  
12 complaint. Defendant contends that the first claim must fail as a matter of law and that the  
13 second and third claims must be dismissed because there is no material issue of fact regarding  
14 why the contracts were lost.

### 15 **LEGAL STANDARD FOR SUMMARY JUDGMENT**

16 A court must grant summary judgment if the pleadings and supporting documents, when  
17 viewed in the light most favorable to the non-moving party, "show that there is no genuine issue  
18 as to any material fact and that the moving party is entitled to judgment as a matter of law."  
19 Fed.R.Civ.P. 56(c). An issue as to any material fact is only "genuine" if the evidence regarding  
20 the disputed fact is "such that a reasonable jury could return a verdict for the nonmoving party."  
21 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of  
22 evidence in support of the plaintiff's position will be insufficient [to preclude summary  
23 judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

### 24 **DISCUSSION**

#### 25 *1. Count 1*

26 Plaintiffs' first claim for relief is brought pursuant to Nevada Revised Statute (NRS)  
27 41.600. NRS 41.600 provides that "[a]n action may be brought by any person who is a victim of  
28 consumer fraud." Nev. Rev. Stat. § 41.600(1). The statute then goes on to define consumer

1 fraud as, *inter alia*, “a deceptive trade practice as defined in NRS 598.0915 to 598.0925,  
2 inclusive.” *Id.* § 41.600(2)(e). The parties do not dispute that the allegations contained within  
3 the complaint contend that Defendant engaged in a deceptive trade practice as defined in NRS  
4 598.0915 to 598.0925 and that such an act would qualify as consumer fraud under NRS 41.600.  
5 Rather, the dispute centers upon whether a competitor may bring suit for harm caused to its  
6 business without evidence of a larger harm to consumers. This question is one of first  
7 impression within Nevada.

8 To support its argument that such a claim cannot be brought without a greater consumer  
9 harm, Defendant cites to *Menasha Corp. v. News America Marketing In-Store, Inc.*, 238  
10 F.Supp.2d 1024 (N.D. Ill. 2003), and *Hall v. Walter*, 969 P.2d 224 (Colo. 1998). These cases  
11 dealt with the consumer fraud statutes of Illinois and Colorado and each concluded that an  
12 essential element of the state statute was some harm to the consuming public as opposed to a  
13 business competitor. The court has reviewed these cases and finds that there is no significant  
14 errors in the analysis leading to their results. However, the court is not inclined to follow their  
15 lead, as Nevada’s statutory scheme compels a different result.

16 Nevada’s statutory scheme contains a provision unique to the analysis of this matter.  
17 NRS 598.0953(1) states: “Evidence that a person has engaged in a deceptive trade practice is  
18 prima facie evidence of intent to injure competitors and to destroy or substantially lessen  
19 competition.” Under this provision, a business shown to be engaged in deceptive trade  
20 practices is presumed to intend for those practices to injure its competitors and destroy  
21 competition. The court finds this provision compelling based on the language of NRS 41.600.

22 As noted above, NRS 41.600 grants standing in consumer fraud cases to “any person who  
23 is a victim of consumer fraud.” It then goes on to define consumer fraud as a deceptive trade  
24 practice. However, the statute never specifically defines “victim.” Leaving open the question  
25 whether a business competitor may be a victim of consumer fraud.<sup>2</sup>

26 The court concludes that NRS 598.0953(1) answers that question in the affirmative. By  
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28 <sup>2</sup> There has been no dispute that Plaintiff qualifies as a person under the statute.

1 creating a presumption that deceptive trade practices harm competitors, then making those same  
2 deceptive trade practices into acts of consumer fraud, the Nevada legislature impliedly defines  
3 competitors harmed by deceptive trade practices as victims of consumer fraud. While such a  
4 result may be generally unusual, it would be even more unusual for a court to ignore the  
5 implications of the legislature and read language into a statute, in this instance a standing  
6 limitation that only consumers may be victims, that was not included within the statutory  
7 scheme.<sup>3</sup>

8 Accordingly, the court concludes that Nevada law allows a competitor to sue under the  
9 consumer fraud statutes when that competitor can demonstrate it was directly harmed by the  
10 defendant's deceptive trade practices. Summary judgment is therefore inappropriate on this  
11 claim.

12 2. *Counts 2 and 3*

13 Defendant also moves for summary judgment on the second and third counts brought by  
14 Plaintiffs, interference with contract and interference with prospective contractual advantage.  
15 The court has reviewed the evidence provided regarding these claims and concludes that there is  
16 a material issue of fact over the reason why Plaintiffs lost certain existing contracts and were not  
17 awarded prospective contracts. The court also sees a material issue of fact concerning whether  
18 Defendant hired illegal workers and attempted to provide improper paperwork for illegal  
19 workers. While the evidence presented was insufficient to warrant a preliminary injunction, as  
20 noted by Defendant in its motion, it is strong enough to create a material issue of fact. As such,  
21 summary judgment is inappropriate on these claims.

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24 <sup>3</sup> The court is not persuaded by Defendant's argument that NRS 598.0953(1) falls outside  
25 the statutes noted as deceptive trade practices in NRS 41.600 and, therefore, cannot be  
26 considered by the court. The statutes listed in NRS 41.600 are the actual deceptive trade  
27 practices made illegal by the Nevada legislature. NRS 598.0953(1) does not define a deceptive  
28 practice itself but, rather, gives meaning to the harm caused by those practices. Thus, the statute  
aids in understanding the reasons the legislature included such claims within the definition of  
consumer fraud and should be used to that end.

**CONCLUSION**

It is therefore ORDERED that Defendant's Motion for summary judgment (#40) is DENIED.

DATED this 13<sup>th</sup> day of August, 2007.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE